

**Caldwell v Shannon Marie Enters.**

2018 NY Slip Op 32639(U)

October 10, 2018

Supreme Court, New York County

Docket Number: 155028/2015

Judge: Debra A. James

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM**

*Justice*

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COURTNEY CALDWELL,

Plaintiff,

- v -

SHANNON MARIE ENTERPRISES and SCOTT J. AVEDA SALON

Defendants.

INDEX NO. 155028/2015

MOTION DATE 09/11/2017

MOTION SEQ. NO. 001

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

ORDER

Upon the foregoing documents, it is  
ORDERED that plaintiff's motion for summary judgment is  
denied.

DECISION

Plaintiff Courtney Caldwell moves, pursuant to CPLR 3212,  
for summary judgment on the issue of liability on her claim for  
negligence, based on the theory of res ipsa loquitur, against  
defendant Shannon Marie Enterprises, Inc. d/b/a Scott J. Aveda  
Salon ("Shannon Marie" or "defendant"), s/h/a Shannon Marie  
Enterprises, Inc. and Scott J. Aveda Salon.

Background

Plaintiff commenced this action against Shannon Marie  
seeking to recover damages for personal injuries she allegedly

sustained during a hair coloring treatment at defendant's salon on March 17, 2014.

Plaintiff's Examination Before Trial ("EBT") Testimony

At an EBT held on December 18, 2015, plaintiff testified she began patronizing defendant's salon in the summer of 2011, and that William Ellis was her usual hairdresser. She stated that William would cut, color, and style her hair, and that he had colored her hair at the salon four or five times prior to the alleged incident. She also stated that she would consult with William prior to getting her hair colored, and that she had been getting the same process, full-head foil highlights, for a long time. She further stated that the color she wanted to achieve with the highlights was blonde, and that she always used the same color.

Plaintiff described the foil process, which involved placing sections of her on a piece of foil, using a brush to apply bleach to her hair sections, wrapping the foil around the sections, and sitting under a heat lamp for few minutes. She stated that she did not know what products were used on her hair, and that she had no prior history of adverse reactions to the products.

Plaintiff testified that on the day of the alleged incident, William performed the foil process on her hair for approximately 35 minutes before placing her under the heat lamp.

She stated that the heat lamp seemed hotter than usual, but that she endured it for approximately four and a half minutes, during which time she kept her head straight up and wrote emails on her mobile phone. She also stated that she did not know whether any part of her head touched the bulbs of the heat lamp. She further stated that she briefly moved her head down, away from the heat, because something didn't feel right. She stated that she then stood and advised William that something was wrong. She also stated that William had another client in his chair and asked her to have a seat in the waiting area. She stated that she complied with William's request, but that she sat only briefly because she continued to experience pain. She stated that she informed William that the foils needed to be removed.

Plaintiff testified that William accompanied her to the shampoo area and that she was crying because the pain was intense. She stated that William's assistant removed the foils and shampooed and conditioned her hair for approximately 10 minutes, but that she continued to experience pain.

Plaintiff further testified that when she returned to William's chair, William began to cut, and blow dry her hair. She stated that William examined her scalp and told her that it looked normal. She also stated that even though she continued to experience pain, she did not tell William that she was uncomfortable or ask him to refrain from using the blow dryer.

She stated that she was in William's chair for approximately 30 minutes, but that William did not completely dry her hair. She stated that the hair on the top of her head was dry, but the hair on the underside was wet when she left the salon.

Plaintiff testified that she returned to her office, approximately 30 minutes from the salon by train, but continued to experience discomfort. She stated that she asked two of her coworkers to look at her scalp, and that they told her that it was red, like sunburn. She stated that she began to experience hair loss, and again asked her co-workers to check her scalp. She stated that her coworkers informed her that there were pockets of bleach and took pictures of her scalp.

Plaintiff testified that she made an appointment with her doctor for the next morning and went home to wash her hair. She also stated that her doctor informed her that she had likely sustained a first degree burn on her scalp and prescribed a topical ointment. She further stated that she visited an urgent care facility because her scalp had split apart, and the pain had gotten worse. She stated that she was informed that she had a second degree burn and was referred to the burn unit at Weill Cornell. She also stated that she continued to experience hair and scalp loss and bleeding.

Defendant's EBT Testimony by William Ellis

At an EBT held on March 31, 2016, William Ellis, plaintiff's hairdresser, acknowledged giving plaintiff highlights and a haircut on the date of the alleged incident. He also acknowledged that he applied color to plaintiff's hair using the foil technique and placed plaintiff under the heat lamp. He further stated that plaintiff got up and notified him that the lamp or foil felt hot, and that he accompanied plaintiff to the shampoo bowl to remove the foils and rinse plaintiff's hair. He stated that he could not recall if plaintiff said anything to him during the process, but that he noticed that the foils were warmer than normal. He also stated that he rinsed plaintiff's hair with cool water, and asked his assistant, Lindsay, to shampoo plaintiff's hair twice and gentle. He stated that after plaintiff returned to his chair, he brushed her hair and looked at her scalp, while cutting her hair. He noted that the back of plaintiff's scalp was pink, like a slight sunburn. He stated that he did not recall if plaintiff advised him of any discomfort; that he apologized to her before she left; and that he extended the friends and family discount to her.

He stated that he was later advised by his general manager that plaintiff had called to speak with her because she had to see a doctor after her salon visit. He stated that he explained

to the general manager that the foils had gotten hot while she was under the heat lamp; that he finished plaintiff's appointment; and that plaintiff expressed that she was happy with her hair.

#### Defendant's EBT Testimony by Nicole Honl

At an EBT held on July 18, 2016, Nicole Honl, defendant's general manager, essentially confirmed William Ellis's account of Ms. Honl's telephone conversation with plaintiff.

#### Report from Plaintiff's Doctor

Plaintiff's physician, Jason Spector, M.D., prepared a summary of plaintiff's medical records and findings after a personal examination of plaintiff. The summary details plaintiff's hospital visits, medical treatments, and reconstructive surgeries to correct the injury to plaintiff's scalp. The physician opined that plaintiff's injury was due to the treatment at the salon on March 17, 2014.

The submissions also include photographs of her scalp following her visit to defendant's salon.

#### The Complaint

The Complaint alleges a claim for negligence based on the doctrine of res ipsa loquitur. The Bill of Particulars contains a similar claim and outlines plaintiff's injuries. The gravamen of plaintiff's claim is that defendant was negligent in the performance of those services, resulting in injury to plaintiff.

Defendant answered, generally denying the allegations in the Complaint and asserting numerous affirmative defenses.

Plaintiff now seeks summary judgment on the issue of liability. Plaintiff argues that the above testimony, report, and photographs conclusively establish defendant's negligence.

#### DISCUSSION

It is well settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Zuckerman v City of New York, *supra*). Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment (*id.*).

As stated, plaintiff, relying on the doctrine of *res ipsa loquitur*, seeks to recover damages for personal injuries she allegedly sustained during a hair coloring treatment at defendant's hair salon. The doctrine of *res ipsa loquitur* permits an inference of negligence to be drawn from the very



occurrence of a certain type of accident and the defendant's relation to it (Pavon v Rudin, 254 AD2d 143, 144-145 [1st Dept. 1998]). If the requirements for application of the doctrine are met, a plaintiff may rest her case on circumstantial evidence when the specific cause of the accident is unknown (Kambat v St. Francis Hospital, 89 NY2d 489, 494 [1997]). Res ipsa loquitur creates a prima facie case of negligence sufficient for submission to the jury, which is permitted but not required to infer negligence (Domatossian v New York City Trans. Auth., 67 NY2d 219, 226 [1986]).

To establish the existence of a triable issue relying on a res ipsa theory, plaintiff must establish that the accident is of a kind that ordinarily does not occur in the absence of someone's negligence; that the instrumentality causing the accident was within defendant's exclusive control; and that the accident was not due to any voluntary action or contribution of plaintiff (id.). It is enough to present evidence from which a reasonable juror could conclude that it is more likely than not that defendant's negligence caused the injury (Kombat, supra, at 494).

Here, plaintiff maintains that the highlighting procedure, performed correctly, would not have resulted in any risk of injury to her. She also argues that defendant was exclusively responsible for every step of the highlighting process. She

further contends that she immediately complained to defendant's employee about her discomfort and did nothing to contribute to her injury. In addition, she asserts that she immediately sought medical attention and followed the instructions of her physicians.

However, defendant argues that the hairdresser had performed the highlighting procedure on numerous occasions, including on plaintiff, without incident, and that he did not deviate from his regular procedure on the day of the alleged incident. Defendant also asserts that the submissions raise questions of fact as to whether plaintiff may have caused her own injury while she was seated under the heat lamp, when she moved her head down or while she was drafting emails on her mobile phone.

On review of the submissions, the Court concludes that the motion for summary judgment must be denied. The submissions raise triable issues of fact as to whether the instrumentality causing the accident was within defendant's exclusive control, and whether the accident was not due to any voluntary action or contribution of plaintiff.

10/10/2018  
DATE

*Debra A. James*  
DEBRA A. JAMES, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE